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8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	Criminal Case No. 07CR3021-WQH
)	
11 Plaintiff,)	DATE: March 18, 2008
)	TIME: 9:00 a.m.
12 v.)	
)	GOVERNMENT'S TRIAL
13 PEDRO CRUZ-TERCERO,)	MEMORANDUM
)	
14 Defendant.)	
)	
15 _____)	

16 COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and
17 through its counsel, Karen P. Hewitt, United States Attorney, and
18 Christopher P. Tenorio, Assistant United States Attorney, and hereby
19 files its trial memorandum.

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I.

STATUS OF THE CASE

A. INDICTMENT

Defendant Pedro Cruz-Tercero ("Cruz") is charged in a one-count indictment, returned November 7, 2007, with Deported Alien Found in the United States, in violation of Title 8, United States Code, Section 1326(a) and (b).

B. TRIAL STATUS

A jury trial is scheduled for Tuesday, March 18, 2008, at 9:00 a.m. before the Honorable William Q. Hayes, United States District Court Judge. The estimated length of trial is one day.

C. STATUS OF COUNSEL

Cruz is represented by counsel Christian De Olivas.

D. CUSTODY STATUS

Cruz is in custody.

E. INTERPRETER

The Government will not require an interpreter for witnesses, however, Cruz may require one for interpreting testimony.

F. JURY WAIVER

Cruz has not filed a jury waiver.

G. PRE-TRIAL MOTIONS

On December 31, 2007, Cruz filed motions to compel discovery and grant leave to file further motions. On January 28, 2008, Cruz filed motions to dismiss the indictment for failure to allege essential elements and to suppress statements. The Government filed its response and opposition to Cruz's motions on February 4, 2008. On the same date, the Government moved for reciprocal discovery and fingerprint exemplars.

1 On February 4, 2008, the Court granted the Government's motions
2 and continued Defendant's motions.

3 On March 3, 2008, Cruz filed motions in limine to disallow 609
4 evidence regarding other crimes, allow reference to punishment
5 enhancement, and allow U.S. Border Patrol agents to testify at trial.
6 Cruz also filed additional motions to suppress statements due to
7 violation of Miranda, and suppress statements due to invalid waiver.
8 The Government filed its response in opposition to Defendant's
9 motions on March 5, 2008.

10 **H. STIPULATIONS**

11 To date, the parties have not entered into any stipulations.

12 **I. DISCOVERY**

13 The Government has complied with its discovery obligations and
14 will continue to do so. To date, no reciprocal discovery has been
15 received.

16 **II.**

17 **STATEMENT OF FACTS**

18 **A. PRESENT OFFENSE**

19 On October 16, 2007, at approximately 3:45 a.m., Border Patrol
20 Agents Jason Wardlow and Daniel Alvarado encountered Defendant Pedro
21 Cruz-Tercero driving a white 1995 Ford Econoline van on Highway 76.
22 The agents knew that the area where Defendant was driving is a route
23 commonly used by alien smugglers to circumvent the I-15 Border Patrol
24 checkpoint. The van sped up as it passed the agents. The agents
25 lost sight of the van for approximately 30 minutes, but later found
26 it parked with its doors open. After 10 minutes, the agents
27 responded to sounds in nearby brush and located Defendant.

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1 Agent Wardlow identified himself as a Border Patrol Agent.
2 Pursuant to an immigration inspection, Defendant stated that he was
3 the driver of the van and that he was a Mexican citizen with no
4 immigration documents to permit him to be or remain in the United
5 States. The agents arrested Defendant and transported him to the
6 Murrieta Border Patrol Station.

7 At the station, at approximately 5:45 a.m., Agent Alvarado
8 advised Defendant of his Miranda rights, which Agent Wardlow
9 witnessed. At 7:45 a.m., Defendant made a video-taped statement in
10 which he admitted his prior convictions and that had not applied for
11 readmission into the United States.

12 Defendant was subsequently indicted on November 7, 2007 for
13 Deported Alien Found in the United States, in violation of Title 8,
14 United States Code, Section 1326(a) and (b).

15 **B. PRIOR HISTORY**

16 **1. Criminal History**

17 Defendant's prior criminal convictions include the following.
18 On January 21, 2000, Defendant was convicted on of Assault of a
19 Person with a Semi-automatic Firearm (felony), in violation of
20 California Penal Code § 245(b), in the Superior Court of San Diego
21 County. Defendant was sentenced to three years probation and 270
22 days in jail. Defendant's probation was revoked on October 18, 2001,
23 and he was sentenced to six years of prison.

24 On October 15, 2001, Defendant was convicted of Possession of
25 a Controlled Substance, in violation of California Health and Safety
26 Code § 11377(a), in the Superior Court of San Diego County.
27 Defendant was sentenced to four years in prison.

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1 **2. Immigration History**

2 Defendant was previously ordered deported on March 12, 2001.
3 Defendant was most recently deported on February 16, 2005 through
4 Calexico, California.

5 **III.**

6 **WITNESSES**

7 The Government expects to call the following witnesses in its
8 case-in-chief, although it reserves the right to change the order of
9 these witnesses, substitute witnesses, add witnesses or omit one or
10 more of these witnesses.

- 11 1. Border Patrol Agent Jason Wardlow
- 12 2. Border Patrol Agent Daniel Alvarado
- 13 3. Immigration Enforcement Agent Gregory Floyd
- 14 4. Fingerprint Expert David Beers
- 15 5. Senior Patrol Agent Jorge Salazar

16 **IV.**

17 **EXHIBIT LIST**

18 The following is a tentative exhibit list of evidence. The
19 Government does not necessarily intend to seek admission of all these
20 items, and may amend the list to include additional items.

- 21 1. Immigration Fingerprint Card (10/16/07)
- 22 2. Record of Deportable Alien (I-213) (10/16/07)
- 23 3. Final Disposition Report (R-84) (10/16/07)
- 24 4. Warrant of Removal/Deportation (I-205) (10/16/07)
- 25 5. Warrant of Removal/Deportation (I-205) (1/18/05)
- 26 6. Warning to Alien (I-294) (1/18/05)
- 27 7. Final Administrative Deportation Order (I-851-A)
28 (1/28/05)

8. Notice of Intent to Issue a Final Administrative Removal Order (I-851) (1/21/05)
9. Video of Defendant's Statement
10. Transcript of Defendant's Statement

V.

JURY INSTRUCTIONS

The Government will submit proposed jury instructions under separate cover, but will include the following regarding the charged offense:

DEPORTED ALIEN FOUND IN THE UNITED STATES [Title 8, U.S.C., Section 1326(a) and (b)] - ELEMENTS:

- 1) the defendant was deported from the United States;
- 2) after deportation, the defendant voluntarily entered the United States;
- 3) after the defendant entered the United States he knew that he was in the United States and knowingly remained;
- 4) the defendant was found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and
- 5) the defendant was an alien at the time of the defendant's entry into the United States.

An alien is a person who is not a natural-born or naturalized citizen [or a national] of the United States.

Committee on Model Criminal Jury Instructions - Ninth Circuit, Manual of Model Jury Instructions for the Ninth Circuit, § 9.5B [2007 Edition - West Publishing Co.][Alien-Deported Alien Found in the United States](modified)

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VI.

LEGAL ISSUESA. INTENT

To convict a defendant pursuant to a Section 1326 "found in" offense, the government must prove beyond a reasonable doubt that the defendant entered voluntarily and had knowledge he was committing the underlying act that made his conduct illegal - entering or remaining in the United States. United States v. Salazar-Gonzalez, 458 F.3d 851, 856 (9th Cir. 2006). The general intent of a defendant to reenter the United States may be inferred, however, from the fact that the defendant was previously deported and subsequently found in the United States. United States v. Rivera-Sillas, 417 F.3d 1014, 1021 (9th Cir. 2005), cert. denied, 126 S. Ct. 1094 (2006). A defendant found in the United States is presumed to have entered willfully and knowingly where he has not raised any evidence to the contrary. Id. at 1020-21.

B. "OFFICIAL RESTRAINT"

The Government must prove that the defendant was found in the United States free from official restraint. See United States v. Ruiz-Lopez, 234 F.3d 445, 448 (9th Cir. 2000) (citing United States v. Pacheco-Medina, 212 F.3d 1162, 1166 (9th Cir. 2000)). Nonetheless, where there is no evidence that government officials constantly or continuously surveilled an alien from the moment of entry, the unexplained presence of an alien some distance from the border is sufficient to establish that the alien entered voluntarily. United States v. Hernandez-Herrera, 273 F.3d 1213, 1219 (9th Cir. 2001); United States v. Quintana-Torres, 224 F.3d 1157, 1159 (9th Cir. 2000).

1 **C. PRIOR DEPORTATION**

2 The lawfulness of a defendant's prior deportation is not an
3 element of the offense under § 1326. United States v. Alvarado-
4 Delgado, 98 F.3d 492, 493 (9th Cir. 1996) (en banc). The Government
5 need only prove that a deportation proceeding actually occurred and
6 that the defendant was consequently deported. United States v.
7 Medina, 236 F.3d 1028, 1031 (9th Cir. 2001).

8 A deportation order or warrant is sufficient to establish the
9 prior deportation. Id.; see also United States v. Bejar-Matrecios,
10 618 F.2d 81 (9th Cir. 1980) (holding a warrant of deportation is
11 admissible as a public record, pursuant to F.R.E. 803(8)). A tape
12 recording or transcript of the prior deportation is not required to
13 prove the prior deportation. Medina, 236 F.3d at 1030-31.

14 Although a defendant charged pursuant to § 1326 can preclude the
15 Government from relying on a prior deportation in which the
16 proceedings were so procedurally flawed that it "effectively
17 eliminated the right of the alien to obtain judicial review," the
18 mere absence of a tape recording or transcript of the deportation
19 proceeding does not establish that the deportation was "fundamentally
20 unfair." See id. at 1031-32 (citations omitted). Finally, because
21 the defendant must also prove prejudice as a result of a flawed
22 deportation proceeding, a vague assertion that he might be able to
23 locate some defect in the proceeding if a tape recording was
24 available is "no more than speculation to support his assertion of
25 prejudice," and insufficient to meet his burden. Id. at 1032
26 (quoting United States v. Corrales-Beltran, 192 F.3d 1311, 1318-19
27 (9th Cir. 1999)).

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1 **D. PRIOR CONVICTION**

2 A prior aggravated felony conviction is not an element of
3 section 1326(a) and should not be presented to the jury. See United
4 States v. Alviso, 152 F.3d 1195, 1199 (9th Cir. 1998) (citing
5 Almendarez-Torres, 523 U.S. at 244). The Supreme Court has indicated
6 that the Ninth Circuit's reasoning in Almendarez-Torres may have been
7 incorrectly decided. See Apprendi v. New Jersey, 530 U.S. 466, 489-
8 90 (2000); United States v. Nordby, 225 F.3d 1053, 1057 n.1 (9th Cir.
9 2000). The holding in Almendarez-Torres remains controlling law,
10 however, until expressly overruled by the Supreme Court. See United
11 States v. Pacheco-Zepeda, 234 F.3d 411, 414 (9th Cir. 2000).

12 **E. ADMISSION OF DEPORTATION DOCUMENTS**

13 **1. Public Records Exception**

14 Although not conclusive, deportation documents are admissible
15 to prove alienage pursuant to Rule 803(8), the public records
16 exception to the hearsay rule. United States v. Hernandez-Herrera,
17 273 F.3d 1213, 1217-18 (9th Cir. 2001). As public records, no
18 foundation is required for their admission because the documents are
19 "presumed trustworthy," thus placing the burden on the defendant to
20 establish untrustworthiness. United States v. Loyola-Dominquez, 125
21 F.3d 1315, 1318 (9th Cir. 1997) (citations omitted).

22 Pursuant to the admission of deportation documents pursuant to
23 the public records exception, an Immigration agent may testify to
24 explain the significance of each document removed from the defendant-
25 alien's A-file. Id. at 1317. Such testimony does not violate the
26 Confrontation Clause. Hernandez-Herrera, 273 F.3d at 1218. Further,
27 the Confrontation Clause is not implicated where a defendant who
28 fails to contest that he never made an application to Immigration

1 authorities for reentry into the United States, is limited in his
2 cross-examination of a witness regarding Immigration record-keeping
3 procedures (including whether Immigration computers are fully
4 interactive with those of other federal agencies, that over 2 million
5 filed documents have been lost or forgotten, whether other federal
6 agencies have the ability or authority to apply for an immigrant to
7 come in the United States, or whether other agencies were consulted).
8 United States v. Rodriguez-Rodriguez, 393 F.3d 849, 856 (9th Cir.),
9 cert. denied, 125 S. Ct. 2280 (2005).

10 **2. Business Records Exception**

11 Alternatively, deportation documents may be admissible as
12 business records. See United States v. Dekermenjian, 508 F.2d 812,
13 814 (9th Cir. 1974) (holding that deportation documents admissible
14 in Section 1326 trial pursuant to 28 U.S.C. 1732, precursor statute
15 to Federal Rule of Evidence 803(6)). A custodian of records or other
16 qualified witness with knowledge of the making, keeping and
17 maintaining of the documents is necessary to testify regarding the
18 methods of keeping the information. A custodian of records may
19 testify what a document means and describe the document without
20 qualifying as an expert witness. See, e.g., United States v. Cooper,
21 375 F.3d 1041, 1045-46 (10th Cir. 2004) (permitting FDIC custodian
22 of records to testify of record-keeping procedures, information
23 reflected by computer records, and interpretations of contents of
24 records).

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VII.

PROPOSED VOIR DIRE QUESTIONS

The United States requests that the following voir dire questions be addressed to the jury panel in addition to the Court's standard jury questions:

1. Has anyone had an unpleasant experience with any law enforcement personnel?
2. Has anyone had any disputes with any agency of the United States Government?
3. Does anyone have strong feelings about the Border Patrol?
4. Does anyone believe that immigration laws are too harsh?
5. Has anyone had an unpleasant experience at the United States border?
6. Does anyone not understand you are not to consider prejudice, pity or sympathy in deciding whether the Defendant is guilty or not guilty?
7. Does anyone have religious or moral beliefs which will make it difficult for them to decide whether a person is guilty or not guilty?
8. Will anyone not follow the law as given by the Court, or disregard any idea of what you believe the law should be?
9. If you are selected, would you want the government to prove its case by a higher standard of proof, say beyond any possible doubt?

DATED: March 12, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Christopher P. Tenorio
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 07CR3021-WQH
)
Plaintiff,) **CERTIFICATE OF SERVICE**
)
v.)
)
PEDRO CRUZ-TERCERO,)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED that:

I, CHRISTOPHER P. TENORIO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S TRIAL MEMORANDUM** on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Christian De Olivas, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Christopher P. Tenorio
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney